nominee of an Australian Company which went into voluntary winding up about four months after entering into the agreement and less than two months after another company purported to have assumed its name. It is seeking to have a liquidator appoint for the joint venture company (1st defendant), which is in a sound financial position, with on-going projects worth millions of ringgit and with 295 employees, without a trial.

I am also of the view that if the plaintiffs were to succeed eventually, the defendants are in a position to satisfy whatever judgment sum, damages and costs of the plaintiff. I do not think the same can be said about the plaintiff.

In the circumstances, besides the question of *locus standi,* I do not think it is just that the order prayed for should be made without even a trial.

The application is dismissed with costs.

NANCY KUAL

v.

HO THAU ON

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[ORIGINATING SUMMONS
NO. K.20 OF 1992]
29 JULY 1993

FAMILY LAW - Marriage between a Native of Sabah and a non-Native - Marriage solemnised according to Native's customs and endorsed by Native Court - Marriage not registered - Whether marriage valid - Whether marriage a Native Customary Marriage - Law Reform (Marriage and Divorce) Act, 1976, ss. 3(4), 5(4), 104 - Native Courts Enactment, 1992, ss. 6(1)(b), 6(3).

WORDS AND PHRASES : " under any law" - Section 5(4) Law Reform (Marriage and Divorce) Act, 1976.

The plaintiff in this case is a Kadazan Tatana and so is a Native of Sabah as defined by Section 2(1)(a) of the Interpretation(Definition of Native) Ordinance 1952. The defendant is a Malaysian Chinese and a resident of Sabah. On 24 June 1990 the plaintiff and the defendant enderwent a marriage ceremony according to the adat-istiadat of the Kadazan Tatana after which they were certified as and declared husband and wife by the relevant Ketua Anak Negeri. Prior to this,on 5 May 1990, a tea party was also held to celebrate their marriage according to Chinese customs. Domestic problems later arose between the parties and in June 1991 the defendant left the matrimonial home for good. The plaintiff took this action and sought a declaration that she is the legal wife of the defendant and that their Native Customary marriage on 24 June 1990 is valid and subsisting in law.

The question before the court was whether the customary marriage as solemnised on 24 June 1990 was valid despite its non-registration under the Law Reform (Marriage and Divorce) Act, 1976.

Held:

[1] Humanitarian grounds demand that the court should support the relationship of husband and wife and discourage any party from treating weddings and marriage rituals lightly. The defendant cannot be allowed to rid himself of his responsibility after going through the

marriage ceremony and the rites and rituals of both the Chinese and the Kadazan customs.

[2] While the Law Reform (Marriage and Divorce) Act, 1976 does not apply to Natives of Sabah whose marriage and divorce are governed by Native Customary Law, it nevertheless recognises marriages solemnised under those laws. The present marriage is one such marriage and it does not matter that the defendant is a non-Native as he has submitted to the marriage rites and customs of the plaintiff. The defendant, furthermore, has not challenged the jurisdiction of the Native Court, with the result that the court has to accept the certificate of the Native Chief certifying the parties as husband and wife.

[3] The present marriage has to be recognised as valid as it is consistent with the provisions of section 104 of the Act. The section in effect recognises a marriage contracted outside Malaysia if such marriage was " contracted in a form required or permitted by the law of the country where it was contracted ". The present marriage is a marriage that was contracted in a form permitted by the law of the country where it was contracted i.e the Native Customary Law in Sabah and the fact that the marriage was contracted in Malaysia does not matter as it gives the court the more reason to recognise the marriage as valid.

Obiter:

[1] It would be a great assistance to the court in attending to the problems of this case had the legislators added, at section 4 of the Law Reform (Marriage and Divorce) Act, 1976, these magic words :

" Nothing in this Act shall affect the validity of any marriage solemnised according to Native Customary Law prior to or after the appointed date .

[2] It seems that registration of every marriage solemnised according to Native Customary Law by a central body in each State and District can help obviate uncertainty. The legislators may thus improve the Act and the Enactment in this respect as it will give equality and dignity to all who are affected.

[Application granted as prayed]

Cases referred to:
*Sugumar v Kui Chin [1984] 2 MLJ 63 (**refd**)*
*Lindo v Belisario [1795] 1 Hag. Con. 216(**refd**)*

Legislation referred to:
Federal Constitution, Art. 161A (7)
Law Reform (Marriage and Divorce) Act, 1976, ss. 3(4),4,5(3),5(4),75(2) & 104.
Native Courts Enactment, 1992 ss.6(1)(b),(3).
Interpretation (Definition of Native) Ordinance, 1952 s. 2(1)(a).

Other sources referred to:
Marriages of Muslims with Non-Muslims [1965] 1 MLJ xvi.
The Law Reform (Marriage and Divorce) Bill, 1972 (1973) 1 MLJ vii.

For the plaintiff - Yee Phui Phing; M/s Skinner, Lind, Robertson, Willie, Wong & Chin
For the defendant - Marina Tiu; M/s Yap Chin & Tiu

JUDGMENT

Syed Ahmad Idid J:
The plaintiff seeks a declaration that she is the legal wife of the defendant and that the Native Customary Marriage entered into between them on 24 June 1990 is valid and subsisting in law.

The plaintiff, born in 1963, is a Kadazan Tatana and so is a Native of Sabah. "Native" is defined by Section 2 (1) (a) of the Interpretation (Definition of Native) Ordinance 1952 which at the beginning was applicable to the Colony of North Borneo.

The defendant was born in 1961 at Beaufort of Chinese parents.

Facts

5 May 1990:

Plaintiff and defendant underwent a Tea Ceremony held to celebrate the marriage between them according to Chinese customs. The defendant's parents, brothers and sisters-in-law and the plaintiff's father and brother attended. Coloured photographs were taken of those who attended and of the plaintiff and defendant in bridal dress/suit and tendered as exhibits. Plaintiff served tea at the ceremony.

The plaintiff and defendant thereafter cohabited as wife and husband.

24 June 1990:

Plaintiff and defendant underwent another celebration of their marriage, this time according to the adat-istiadat (customs) of the Kadazan Tatana at the plaintiff's father's residence. During this occasion, which the plaintiff de-

scribes as "Native Marriage", the plaintiff and the defendant served tapai (rice wine) to the Ketua Anak Negeri (Native Chief) of Kuala Penyu, who witnessed the marriage, and all elders.

Plaintiff and defendant continued to cohabit until they experienced domestic problems. The defendant then left the matrimonial home in August 1990 for a few days. The defendant again left the plaintiff in January 1991 when the plaintiff was expecting a child. He returned in April but left again in June 1991 and has not returned to the plaintiff since.

What then followed were meetings between the plaintiff and the defendant with the Native Court. At one meeting, the defendant, on being shown the photographs of the marriage, replied that "Itu main-main sahaja" ("That was merely a playful thing").

The plaintiff and defendant did not register their marriage under the Law Reform (Marriage and Divorce) Act 1976 ("the said Act").

The Ketua Anak Negeri of Kuala Penyu on 9 December 1991 certified that both "Encik Ho (defendant) and Puan Nancy Kual (plaintiff) telah melangsungkan perkahwinan pada 24 June 1990 mengikut adat istiadat Kadazan Tatana" and "accordingly they are certified as husband and wife".

I need not go into the other problems which the plaintiff encountered with the defendant, e.g. of the misuse of credit cards, of pregnancy test, of plaintiff's meeting with defendant's mother, and of police report on defendant's disappearance.

The issue is:

> Whether, in view of s. 5(4) of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") read with s. 3(1) thereof, a marriage solemnised under Native Customary Law and not registered in accordance with the provisions of the Act between a non-Native (the defendant) and a Native (the plaintiff) is valid.

Miss Yee Pui Phing, of Counsel, contends that the marriage is valid despite its non-registration. She quotes s. 3(4), that the Act does not apply to any Native of Sabah and the plaintiff is a Native. But the defendant is not. Hence the difficulty that both Counsel met in their attempt to resolve the claim. Unfortunately, this point has not been raised nor decided before. The defendant, in defence, merely states that he is "..... by race, a pure Chinese."

Social Impact On The Community

The Court was told that there are many couples in similar circumstances in Sabah. They participated in the ceremonies and rituals but did not register. The following situations spring to mind:

(a) A Muslim marrying another Muslim. In such a case, their marriage must be governed by the Syariah Law. Section 3(3). Notwithstanding that one or both are Natives. For the present reckoning, there is no such liaison as a non-Muslim marrying a Muslim for the purpose of our discussion. This is due to the fact that before a non-Muslim can marry a Muslim he or she first embraces Islam. Then as a Muslim, he or she is permitted to go through the marriage ceremony which is solemnised by a Kadi. See article on "Marriage of Muslims with Non-Muslims" which discusses the case of *Abdul Razak v. Lisia Binte Mandagie alias Maria Menando*[1965] 1 MLJ xvi.

(b) A non-Muslim Native marrying another non-Muslim Native - if their marriage is governed by the Native Customary Law, then the Act does not apply. Section 3 (4). The law does not, it seems to me, prohibit a Native of any religion (except Islam) from marrying another Native of the same or any other religion (except Islam) from contracting a marriage under the Native Customary Law.

(c) A Native marrying a non-Native who may be a Malaysian or a foreigner.

The third scenario describes the case today as the plaintiff is a Native and the defendant, though a Malaysian, is not a Native.

Law After 1st March 1982 In Sabah

The Act provides for monogamous marriages for non-Muslims. By s. 5(4), no marriage, after 1st March 1982, under any law, religion, custom or usage may be solemnised except as provided in Part III which deals with restrictions on marriage, preliminaries and solemnization of marriage. By Part IV, s. 27, the

marriage of every person ordinarily resident in Malaysia and of every person resident abroad who is a citizen or domiciled in Malaysia shall be registered pursuant to the Act. The "marriage" in our instant case has not been so registered.

While the plaintiff is clearly a Native, the Act can only be taken as not applying to her if the Court accepts that her "marriage is governed by Native Customary Law". There is no difficulty if both she and the defendant are Natives but sadly this is not the case. Section 3 (4) of the Act seems to put a question mark on the defendant's role and capacity as it happens that he is a non-Native. According to Miss Marina Tiu, of Counsel, the defendant's part in the ceremony makes the marriage void as the word "race" in s. 5(3) of the Native Court Ordinance or 6(3) of the Native Court Enactment refers to the sub-groups within the Natives and not race as referring to Chinese, Malays and others. But see *Sugumar v. Kui Chin* [1984] 2 MLJ 63. Even if I accept this argument (which seems to be on good grounds if we read Article 161A (7) of the Federal Constitution which is in respect of Sarawak), it seems to me the matter is still caught by Section 6 (1) (c) of the 1992 Enactment.

I am somewhat curious at the intent of Section 5(3) of the Act which states:

> Every person who on the appointed date is unmarried and who AFTER THAT DATE marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia."(emphasis on AFTER THAT DATE).

It appears to imply that the Act "accepts" a marriage performed under "any law, religion, custom or usage "AFTER THAT DATE (which, for Sabah, is after 1st March 1982). It can apply to both the plaintiff and the defendant, notwithstanding any decision of this Court today, "during the continuance of such marriage" unless their marriage is void in contravention of Section 5 (4).

Then subsection (4) says:

> After the appointed date, no marriage under any law, religion, custom or usage may be solemnised except as provided in Part III.

Ceremony and Rituals

I am of the opinion that the marriage in today's case cannot be declared as valid and subsisting if based only on the form of ceremony and rituals which the parties underwent according to Chinese customs on 5 May 1990. While the Act does not prohibit the observance of the old Chinese customs and rituals from continuing, the Act however recognises the marriage as valid only when its registration follows in the manner so provided. This is due to the fact that the law has been changed from March 1979 for Peninsular Malaysia and from March 1982 as for Sabah. By Section 5 (4), after the appointed dates, no marriage under any law, religion, customs or usage may be solemnised. In my opinion "under any law" means either "under any law except this "or "under any other law". If the marriage is so solemnised in contravention of the Act, it is, by Section 6, **void**.

Historical

The Act was based on the recommendations of the Royal Commission which studied and examined the prevailing laws relating to marriage and divorce (other than Muslim marriages). It considered the representations from various racial and religious groups. The Bill was originally introduced in the Dewan Rakyat in December 1972 but was referred to a Joint Select Committee which caused the original Bill to be redrafted. See article on The Law Reform (Marriage and Divorce) Bill 1972 [1973] 1 MLJ vii.

Subject to the provision of Section 75 (2) of the Act, any child of a void marriage is treated as a legitimate child of his parent if, at the time of the solemnization of the marriage, both or either of the parties reasonably believed that the marriage was valid. I do not have to determine this as the union between plaintiff and the defendant has sadly led to her miscarriage.

Support for the Institution of Marriages

The order which I shall make is based on the humanitarian grounds of supporting the relationship of husband and wife and discouraging any party from treating weddings and marriage rituals lightly. Sex can be enjoyed in the confines of a home recognised by both law and religion as one which engenders goodwill. To allow otherwise would encourage sea-gulls, i.e.

persons from outside who swoop into Sabah or another community to savour sex and then exit with no liability whatsoever. It so happens the Native today is a female. Next time it may be the reverse. But the law is the same: he who contracts a marriage must take it seriously. Whatever the law may say, a marriage is held by some persons as a civil contract and by others that it is sacred, religious and spiritual. As Sir William Scott in *Lindo v. Belisario* [1795] 1 Hag. Con. 216 said:

> If they agree and pledge their froth to resign to each other the use of their persons, for the purpose of raising a common offspring, by the law of nature that is complete;

or to quote the maxim of the Roman Civil Law, *Consensus non concubitus facit matrimonium*.

Whether the Act Accepts the Native Customary Marriage:

I will now proceed to the marriage according to Native Customary Law of Sabah. Can it be valid or should the Court rule it as void? Section 3 (4) says that the Act does not apply to Natives of Sabah whose marriage and divorce are governed by Native Customary Law, and the plaintiff's marriage was so governed. Should the fact that the defendant is not a Native matter? I should think not. He decided to marry a Native and observed the rites and customs of the woman. He cannot make tracks and then retract. Section 6 (1) (b) of The Native Courts Enactment 1992 (which is similarly worded as in Section 5 (1) (b) of the Native Courts Ordinance (No. 6 of 1953) now repealed) provides that the Native Court can exercise jurisdiction to hear, try, determine and dispose of cases arising from breach of Native law or custom, religious, **matrimonial** or sexual..... where one party is a **native** (Section 5 (1) (b) of the 1953 Ordinance). The legislators seem unsure when they use the words non-Native and Native. Either description seems to be immaterial in this context. One can say the glass is half-full or half-empty. Perhaps in an appropriate case where there may be more than two parties, one or the other of the description may change the course of arguments but not so in today's case.

Coming back to the question of the applicability of the Native Courts Enactment/Ordinance, it would have assisted greatly if the Act had, at its Section 4, added:

> Nothing in this Act shall affect the validity of any marriage solemnised according to Native Customary Law prior to or after the appointed date.

The circumstances of this case would have been taken care of if the Act had added those magic words. It does, however, say *albeit* in an oblique way that marriages by Native Customary Laws are recognised [See Section 3 (4)]. Although one of the parties here is a non-Native, I am of the opinion that the marriage which both the defendant and the plaintiff went through according to the Kadazan Tatana is to be recognised as valid parallel to Section 104 though that section speaks of "marriage contracted outside Malaysia". I am of the opinion that the marriage in our case "shall be recognised as valid for all purposes of the Law of Malaysia" [Section 104(a)]. This conclusion is based on my belief that the present "marriage was contracted in a form required or permitted by the law of the country where it was contracted", i.e. according to the Native Customary Law here in Sabah. When the defendant appeared at the Native Court, he did not challenge the jurisdiction then and neither had his Counsel challenged this before our Court. I therefore accept the certificate of the Native Chief at "NK-4". Furthermore, *a fortiori* because the marriage in question was contracted in Malaysia it should add strength to my belief that it be recognised as a valid marriage. On these grounds, I now grant the order applied for by the plaintiff and declare that she is the legal wife of the defendant and that her marriage on 24 June 1990 is valid and subsisting. To allow the defendant to rid himself of his responsibility after going through the ceremony and the rites and rituals of both the Chinese and Kadazan customs will be to encourage the vandalism of a woman, a little short of cannibalism both of which must be eradicated in all forms and at all stages. Order accordingly.

It seems to me that registration of every marriage solemnised according to Native Customary Law by a central body in each State and District can help obviate uncertainty. The legislators may now wish to improve on the Act and the Enactment in this respect with the view of assisting present and future marriages. This can give equality and dignity to all who are affected.